No. 2948

IN THE

United States Circuit Court of Appeals

NINTH JUDICIAL CIRCUIT

JOHN FAIR NEW,
Plaintiff in Error,

—vs—

UNITED STATES OF AMERICA,
Defendants in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR

REISNER & HONEY,
Attorneys for Plaintiff in Error.

CHRONOLOGICAL INDEX TO PRINTED BRIEF.

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This case comes here on a writ of error to the United States District Court for the Northern District of California, first division, granted September 29th, 1916. (Tr. 245). To review a judgment of said Court dated August 30th, 1916, (Tr. 81); sentencing plaintiff in error, (hereafter called defendant) to imprisonment for two years at McNeils Island, after a verdict finding him guilty of using the United States post office establishment in furtherance of a scheme to defraud divers persons. The indictment, (Tr. 4) which is divided into seven counts, charges defendants with using the post office establishment in the execution of a scheme to defraud. (The defendant, John Fair New, was charged and tried jointly with Marie T. Graham.) The defendant before this court was found guilty on the 2d, 3d, and 4th counts of the indictment and on the other counts not guilty; the defendant Marie T. Graham was found not guilty on all counts of the indictment.

The first count of the indictment sets forth; "that the defendants on the first day of January 1913, at San Francisco, then and there, being, had then and there devised a scheme and artifice to defraud various persons and the public generally; which said scheme to defraud was to be carried on by and through and by means of the post office establishment of the United States by opening and intending to open correspondence and communication with the said victims and by inciting said victims to open a correspondence through the said post office establishment, and that the post office establishment was then and there a part of said scheme to defraud, which said scheme and artifice, to defraud, was to be carried on and effected by the following means."

"That said defendants would pretend that defendant John Fair New, was a human being, who had attained the super-natural state of self-immortality in the body, by a course of righteous conduct consisting of abstinence from the use of meats of any kind as food; abstinence from the use of intoxicating liquor of any kind; abstinence from telling false-hoods and bearing false witness against his neighbor, and lastly by abstinence from the sin of committing adultery, by acts committed, evil desires, lustful eyes or otherwise." (Tr. 5)

"That such super-natural power had enabled him to conquer disease, death, poverty and misery; that this power could be transmitted by said John Fair New, to others who were willing to accept his teachings and pay therefor the sums demanded by him." (Tr. 5)

"That defendants did likewise pretend that said John Fair New was of divine origin and birth, a son

of the Holy Ghost, greater in authority, majesty and power than was Moses, Elijah, or John the Baptist; Yea, that the mantle of the "Man of Galilee" had fallen upon him and he had received the "keys to the kingdom of Heaven." (Tr. 5)

"That each and every one of these pretentions would be false and untrue and known by said defendants and each of them to be false and untrue; that said John Fair New had no super-natural power or authority of any kind or character, but was an imposter, an heretic, a seeker of vain-glory, a coveter of his neighbor's goods and his neighbor's wife and was also an habitual indulger in each and every of the sins and practices he pretended to condemn, to-wit: eating the flesh of animals, drinking intoxicating liquors, using profane language, telling falsehoods, bearing false witness and committing adultery." (Tr. 6)

"That the defendants in order to obtain money and other things of value from said victims would pretend that said John Fair New was the author of a large number of books, to-wit: 100 then published treating of the said super-natural gifts and power and its transmission to others; the said John Fair New not being then and there the author of said one hundred books, or any number of books, other than one book as the defendants then and there well knew and that volume consisting only of a small compilation of platitudes and garbled extracts from other works." (Tr. 6)

"That the defendants would organize in various cities of the United States, companies, associations and corporations of various kinds with the ostensible object of publishing and selling said one hundred

books, printing and publishing magazines, educating and instructing eligible persons and conferring upon them said super-natural gifts and powers above described and set forth; and that they would claim that said one hundred books were then being published and that said magazines were being published with the intention and purpose that the parties above named, to-wit: the victims and others, should invest money in stock and capital of said concern, and in subscriptions to said magazine, and purchase alleged courses of instructions in said super-natural powers and gifts; the defendant intending thereby to appropriate to their own use the sum and sums so invested, well knowing that no books of any kind other than the one volume above referred to, was being published, or was to be published, by the defendants and well knowing that no magazines were being published, or was to be published, by them, and also then and there well knowing that it was not the intention of said defendant or either of them to publish any books or magazines or give anything of value for said money invested; The true intention of said defendants being to appropriate to their own private use all money received and when said fraudulent acts became known to remove themselves to other cities of the United States and organize similar concerns and corporations and make the same false pretentions under the name of different corporations or associations and using assumed and fictitious names for themselves for such purposes." (Tr. 7)

"That it was a part of said scheme that defendants should advertise and claim that they had organized according to law, and were conducting according to law, an educational University which had for its

objects the instruction and graduation of eligible persons applying in the said art and power of supernatural healing and teaching; and that defendants should advertise that seventy free scholarships had been endowed by a man of great wealth and that those getting said scholarships would pay only ten dollars ($10.00) for enrollment and five dollars ($5.00) more on graduation; and that those students not possessing said scholarships would have to pay one hundred ($100.00) dollars; the true intent and purpose of said defendants being as they well knew, to induce as many enrollments at ($10.00) each as they could get; and that the victims might be induced to believe that a bargain of exceptional opportunity was being offered them to graduate and receive a lawful degree from said University, and might also be induced to invest money in said University; in exchange for an alleged position or office therein; the defendants then and there knowing that no scholarships of any kind were endowed and it was not their intention to limit the issue of said scholarship to seventy, or to any other number, and further then and there knowing that no efficacy or power was lodged in said teaching of said alleged University, and further well knowing that the said victims were not to receive and would not receive anything of value for the money so invested by them." (Tr. 8)

"That it was a part of said scheme that defendants should make a false application of sections 602 and 602a of the Civil Code of the State of California, relating to the creation of corporations sole out of religious society in this; that defendants should pretend and claim for the purpose of inducing the said victims to invest money in the said corporations and

associations and subscribe for said magazine and take and pay for said scholarships and purchase said book; that the Newthot Church was a national organization consisting of many branches, situated in various parts of the world and that pursuant to the regular adoption of rules and regulations, a Newthot congress had been called and held in San Francisco; that the defendant, John Fair New under the name and guise of, Newi Newo New, has been elected head pastor or archbishop of said Newthot Church for life with the power of transmission by will, or otherwise, to his successors, of the powers so conferred and that among said powers so conferred on said head bishop, was the power to bestow the title of healer, pastor and bishop upon the graduates of said alleged University, and the investors in said corporations or associations and the subscribers of said magazine, and the purchasers of said scholarships and said book." (Tr. 8)

"To that end said defendants should cause to be filed with the County Clerk of the City and County of San Francisco, State of California, an affidavit required by said sections 602 and 602a of the Civil Code of the State of California, showing that the defendant, John Fair New, had been regularly elected to said office as head bishop; that a position of pastor, healer, or teacher in said Newthot Church should be promised to said victims in order to induce them to invest their money in the various branches of said scheme above described; that defendants then and there well knowing that the Newthot Church, with which the defendant claimed to be identified, had no existence at any time or place, national or otherwise, and that no Newthot congress had been called or held

and that no machinery existed whereby such a congress could be called or held and that no material existed from which to convene such a congress and that said affidavit would be false and untrue; the true intention and object of the defendants being to falsely and fraudulently assume, claim, and pretend that the defendant, John Fair New, had attained power and authority to which he was, as defendants well knew, not entitled, and in fact did not possess, in order to obtain money and other things of value from said victims in connection with the above matter herein above set forth." (Tr. 9)

"That on the 25th day of May 1911, defendant unlawfully caused to be placed and deposited in the post office establishment of the United States, a certain envelope addressed to Ira M. DeLong." (Tr. 10)

The 2nd, 3d, 4th, 5th, 6th and 7th counts of the indictment are in the same language as the first count, above set forth, except that they charge the mailing of letters addressed to persons named in each of said counts. (Tr. 11)

2nd count, Tr. 11; 3d count, Tr. 14; 4th count, Tr. 17; 5th count, Tr. 20; 6th count, Tr. 22; 7th count, Tr. 25; On August 25, 1916, after a trial the jury rendered a verdict finding the defendant, John Fair New guilty under the 2d, 3d, and 4th counts, (Tr. 80.); and recommended him to the clemency of the court, and not guilty on the other counts.

The questions involved on this writ of error are:

1st. The order denying defendant's motion to quash.

2d. The order overruling defendant's demurrer.

3rd. The order denying defendant's motion for a bill of particulars.

4th. The order denying defendant's motion to dismiss, made on the ground that he had not been given a speedy trial.

5th. The admission of evidence over the defendant's objection.

6th. The order of Court refusing to direct a verdict of acquittal at the conclusion of plaintiff's case.

SPECIFICATION OF ERRORS RELIED UPON

1st. The first assignment of error is based upon the order denying defendant's motion to quash interposed on the ground viz.; that the names of the witnesses who testified before the grand jury were not appended to or indorsed upon the indictment. Tr. 86.

2d. The second assignment of error is based upon the order denying defendant's motion to quash made on the ground that the indictment contains irrelevant, immaterial and prejudicial allegations which constitute an attack upon the religious beliefs of the defendant. Tr. 86.

3d. The third assignment of error is based upon the order denying defendant's motion to quash made on the ground, viz.; that said indictment contains irrelevant, immaterial and prejudicial allegations which constitute an attack upon the teachings of the religious society or organization to which defendant belongs. Tr. 86.

4th. The fourth assignment of error is based upon the order denying defendant's motion to quash made on the ground viz.; that said indictment con-

tains irrelevant, immaterial and prejudicial allegations which constitute an attack upon the character of the defendant, JOHN FAIR NEW.

5th. The fifth assignment of error is based upon the order denying defendant's motion to quash made on the ground viz.; that said indictment charges the defendant, JOHN FAIR NEW, with depositing, and causing to be deposited in the mails, letters in furtherance in a scheme to defraud, where, in fact, said indictment alleges many schemes to defraud and does not specify in furtherance of which of these schemes said letters were so deposited in the mails. Tr. 87.

6th. The sixth assignment of error is based upon the order overruling the demurrer to the indictment interposed on the ground viz; that said indictment does not state facts sufficient to constitute an offense against the laws of the United States, or any offense at all. Tr. 87.

7th. The seventh assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment the nature of the supernatural powers alleged in said indictment to be claimed by the defendant JOHN FAIR NEW, by which he conquered death, poverty, disease and misery. Tr. 87.

8th. The eighth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment in what the defendant was an heretic, or against what established religion or church, the defendant is an heretic. Tr. 87.

9th. The ninth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment what vain-glory the defendant, JOHN FAIR NEW, sought or how, or in what manner, he sought such vain-glory. Tr. 88.

10th. The tenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment how, when, or where, the defendant, JOHN FAIR NEW, was a coveter of his neighbor's wife, or what neighbor's wife. Tr. 88.

11th. The eleventh assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where the defendant JOHN FAIR NEW, ate the flesh of animals, or what animals.

12th. The twelfth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where, the defendant, JOHN FAIR NEW, drank intoxicating liquors or what intoxicating liquors. Tr. 88.

13th. The thirteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where the defendant, JOHN FAIR NEW, used profane language or what profane language he used.

14th. The fourteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where the defendant, JOHN FAIR NEW, told falsehoods, or what falsehoods, and to whom he told them.

15th. The fifteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where, or in what court, the defendant, JOHN FAIR NEW, bore false witness, nor against whom he bore false witness.

16th. The sixteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when or where the defendant, JOHN FAIR NEW, committed adultery, or with whom he committed adultery.

17th. The seventeenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment what one book the defendant, JOHN FAIR NEW, was the author of, nor can it be ascertained what other works said one book was only a small compilation of platitudes and garbled extracts from, nor can it be ascertained therefrom what those platitudes and garbled extracts are.

18th. The eighteenth assignment of error is based upon the order overruling the defendant's demurrer

to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment the names of the various cities in the United States in which the defendant, JOHN FAIR NEW, is alleged to have organized companies, associations, and corporations, nor under the laws of what states and cities said corporations, companies, and associations were formed, nor the names of said companies, associations, or corporations. Tr. 89.

19th. The nineteenth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment how, or in what manner, the defendant, JOHN FAIR NEW, intended to appropriate the sum, or sums, of money alleged in the indictment, to his own use. Tr. 89.

20th. The twentieth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment what assumed or fictitious names the defendant, JOHN FAIR NEW, assumed for the carrying out of the purposes sought to be alleged in the indictment. Tr. 89.

21st. The twenty-first assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment how, or in what manner, the defendant, JOHN FAIR NEW, was going to, and did, advertise the organization and conducting of an educational university. Tr. 89.

22nd. The twenty-second assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment who was the man of great wealth who had endowed said university with seventy free scholarships. Tr. 89.

23rd. The twenty-third assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that it cannot be ascertained from said indictment when the defendant, JOHN FAIR NEW, should cause to be filed with the County Clerk of the City and County of San Francisco, State of California, an affidavit as required by section 602-602A, of the Civil Code of the State of California, or if so filed, when said affidavit was filed. Tr. 89.

24th. The twenty-fourth assignment of error is based upon the order overruling the defendant's demurrer of said indictment interposed on the ground, viz; that said indictment charges the defendant, JOHN FAIR NEW, with depositing, or causing to be deposited, in the mails, a letter in furtherance of a scheme to defraud, where, in fact, said indictment alleges many schemes, and does not state in furtherance of which of these schemes said letters were so deposited. Tr. 89.

25th. The twenty-fifth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that said indictment is ambiguous for each and all of the reasons for which it is herein alleged to be uncertain. Tr. 89.

26th. The twenty-sixth assignment of error is based upon the order overruling the defendant's demurrer to said indictment interposed on the ground, viz; that said indictment is unintelligible for the same reasons it is alleged to be uncertain and ambiguous. Tr. 89.

The twenty-seventh to fifty-fourth assignments of errors are directed at the other counts in the indictment and present the same points as are herein above specified, and it would only be repetition to set them forth in full.

55th. The fifty-fifth assignment of error is based upon the order denying defendant's motion for a bill of particulars in the following matters upon which a bill of particulars was demanded:

a. What is the nature of the supernatural powers alleged in said indictment to have been claimed by the defendant JOHN FAIR NEW, by which he conquered death, poverty, disease and misery.

b. In what is the defendant JOHN FAIR NEW, an impostor.

c. What vain-glory did the defendant JOHN FAIR NEW seek.

d. How did the defendant JOHN FAIR NEW seek vain-glory.

e. How did the defendant JOHN FAIR NEW covet his neighbor's goods.

f. Where did the defendant JOHN FAIR NEW covet his neighbor's goods.

g. When did the defendant JOHN FAIR NEW covet his neighbor's goods.

h. Who is the neighbor whose goods the defendant JOHN FAIR NEW is alleged to have coveted.

i. What goods of such neighbor did the defendant JOHN FAIR NEW covet.

j. How did the defendant JOHN FAIR NEW covet his neighbor's wife.

k. When did the defendant JOHN FAIR NEW covet his neighbor's wife.

l. Where did the defendant JOHN FAIR NEW covet his neighbor's wife.

m. Who is the neighbor whose wife defendant JOHN FAIR NEW is alleged to have coveted.

n. Who is the wife of such neighbor the defendant JOHN FAIR NEW is alleged to have coveted.

o. Of what animals did the defendant JOHN FAIR NEW eat the flesh of.

p. When did the defendant JOHN FAIR NEW drink intoxicating liquors.

q. What profane language did the defendant JOHN FAIR NEW use.

r. What falsehoods did the defendant JOHN FAIR NEW tell.

s. Against whom did the defendant JOHN FAIR NEW bear false witness.

t. In what court of tribunal did the defendant JOHN FAIR NEW bear false witness.

u. Where was the defendant JOHN FAIR NEW married.

v. When was the defendant JOHN FAIR NEW married.

w. Who is the wife of the defendant JOHN FAIR NEW.

x. From what other works was said "one" book only a small compilation of platitudes and garbled extracts.

y. What are the platitudes and garbled extracts which said one book is alleged to contain.

z. In what cities of the United States did the defendants organize companies, associations and corporations as alleged in the indictment.

al. What were the names of said companies, associations and corporations.

bl. When were said companies, associations and corporations organized.

cl. Where were said companies, associations and corporations organized.

dl. Under the laws of what states were said corporations organized.

el. In what manner did the defendants intend to appropriate to their own private use, the sum or sums of money so alleged in the indictment.

fl. To what other cities of the United States did the defendants intend to remove themselves when the fraudulent acts sought to be alleged in the indictment became known.

gl. What concerns and corporations did the defendants intend to organize in the alleged "other cities of the United States" to which the defendants are alleged to have intended to remove themselves.

hl. What were the names of said corporations and associations the defendants are alleged to have intended to organize.

il. What assumed and fictitious names did the defendants use.

jl. Where did the defendants use assumed and fictitious names.

kl. When did the defendants use assumed and fictitious names.

ll. Through what medium did the defendants intend to advertise the organization and conducting of an educational university.

ml. Where did the defendants intend to advertise the organization and conducting of an educational university.

nl. When did the defendants make a false application of sections 602-602A of the Civil Code of the State of California, or when did they so intend to make such a false application of said sections of the Civil Code of the State of California.

That the said afore-mentioned matters related to the general allegations contained in the indictment and it was impossible for defendant JOHN FAIR NEW to prepare his defense without the knowledge demanded in said items above set forth.

56th. The fifty-sixth assignment of error is based upon the order granting plaintiff's motion for a continuance of said trial on March 20th, 1916, in this that there was no legal showing made for such continuance and defendant's defense was prejudiced by such continuance.

57th. The fifty-seventh assignment of error is based upon the order denying defendant's motion to dismiss the indictment interposed upon the ground viz; that at the time said motion was made the defendant JOHN FAIR NEW, had not been given a speedy and public trial in accordance with the pro-

visions of the constitution of the United States and was therefore entitled to a dismissal of said indictment.

58th. The fifty-eighth assignment of error is based upon the admission of evidence over defendant's objection.

1. The court erred in admitting the following letter in evidence. This is the letter contained in the second count of the indictment. U. S. Exhibit 22.

July 8th, 1915.

Mr. Henry H. Doolittle,
511 So. Olive St.,
Los Angeles, Cal.

My dear Brother:—

We are in receipt of your valued favor of recent date and thank you very much for your cordial and fraternal words of welcome.

In answer to your question would say, that we have a fine copy of our three dollar book on THE NEWTHOT SCIENCE. This is the revised edition of the book we wrote you in regard to some time ago the price of which was two dollars. This book is handsomely bound in cloth and stamped in gold and sells for three dollars, but if you wish us to send it to you, you may send along the two dollars, and we will at once send it to you prepaid and call it square, as we are desirous of having you own a copy of this book which we feel that you will enjoy immensely.

With the hope of hearing from you soon, I remain, my dear brother and friend, always,

Faithfully thine in truth, love and peace,

(Signed) N. N. New, (Bishop THE NEWTHOT TEMPLE, INC.,)

Palace of Education, P. P. I. E., San Francisco, Calif.

2. The court erred in admitting the following letter in evidence. This is the letter contained in the third count of the indictment. U. S. Exhibit 23.

July 22nd, 1915.

Mr. Henry H. Doolittle,
511 So. Olive Street,
Los Angeles, Calif.

Dear Brother:

We are in receipt of your valued favor of recent date, making inquiry in regard to The Newthot Science, and in reply hasten to advise you that we will send you a copy of the paper bound edition containing 408 pages, on receipt of $1.00 by prepaid parcel post. This book contains the element of all of the 100 books on the Newthot Science. I note all you say, and appreciate every kindly word. We are very busy here in connection with the Newthot Science Exhibit, having thousands of callers who are interested in the Newthot Science.

If you prefer, we will send you a copy of the cloth edition for $2.00, but as you say the paper-bound edition will answer the same purpose, as it is exactly the same save in the binding only. We are sure that you will be pleased with this work, and sure that if you will follow its teachings it will add years to your life and life to your years. We hope that you can arrange matters so that you can visit the fair and also the Newthot Science Exhibit.

Hoping to have the pleasure to hear from you soon again, we are my dear sir and brother, always,

Faithfully thine,

(Signed) N. N. New, President."

3. The court erred in admitting the following letter in evidence. U. S. Exhibit 24.

San Francisco, May 28, 1914.

Dear Friend:

This Letter of Appointment is to inform you that Dr. New will teach a class of seventy students, in our Extension University, and your name has been selected as a worthy beneficiary for one of the 70 free scholarships, as described in The Newthot University Circular enclosed herein.

This scholarship will entitle you to take the Complete Course leading to the Degree of Doctor of Newthot, D. N. in your own home in two to three months, according to spare time devoted to study.

The Degree of Doctor of Newthot, D. N. is a license to teach, preach and practice The Newthot Science in all the states, territories, colonies and dependencies of the United States, and all foreign countries and to heal all manner of ills to which humanity is heir, without resort to Materia Medica in any form.

This class will be personally conducted by Dr. New, Head of The Newthot University Corporation, and Chairman of The Newthot World Congress to be held in this city in 1915, when all Newthot graduates will be invited to come and take part in the deliberations of this Convention.

The regular tuition for the complete course is $100 but scholarship students are only required to pay the usual Enrollment, $10, and diploma, $5, to cover the incidental expenses.

The Enrollment is payable at the time of beginning the course, and diploma, at the time of graduation. All that is necessary is to enclose the Enrollment fee with your application, and we will begin at once. This includes textbooks, lessons, instruction and examinations leading to graduation for the Doctorate Degree.

A suitable location will be reserved for each graduate who will be assigned to that position as a Newthot Science teacher, lecturer, and practitioner immediately upon graduation. We will hold this scholarship for you until we have had time to receive your acceptance.

An early response is desired in order that this scholarship may be placed at the earliest possible date.

Faithfully Yours,

THE NEWTHOT UNIVERSITY, Inc.,

By J. F. New Jr., Sec'y.

N. B. In your reply refer to scholarship No. 37 reserved for you. Make all funds payable to The Newthot University, and remit by Post Office Order, Express Order, Bank Draft, or Certified Check as banks charge on personal checks.

4. The court erred in admitting the following letter in evidence. U. S. Exhibit 27.

The Newthotist Monthly Devoted to the Newlife of Health, Happiness, Prosperity, Longevity, Immortality, Eternal Youth, Beauty and Peace.

THE NEWTHOT MAGAZINE

Dr. N. N. New, Editor; Contributing Editors from All Parts of the World; C. R. Evans, Business Mgr.

No. 2, Golden Gate Ave.,

San Francisco, California.

Having learned that you are interested in Newthot, we are taking this means of announcing the publishing of THE NEWTHOT MAGAZINE in San Francisco by Dr. N. N. New.

The object of this magazine is to teach that correct methods of living and thinking will overcome all existing evil conditions and to spread broadcast the TRUTHS that will result in per-

petual health and happiness to all.

Authorities from all parts of the world will contribute to this publication and every phase of Newthot Science and Philosophy will be dealt with in our columns.

The Subscription rates are, 50 cents for 12 months or $1.00 for three years and if you will send your subscription in so that it will reach us on or before May 1914 together with a short list of names of persons who might be interested in THE NEWTHOT MAGAZINE we will send you ABSOLUTELY FREE by return mail, a copy of "NEWOLOGY," Dr. New's splendid book on Newthot Science.

The supply of these books is limited so this offer can not be extended beyond the above date.

Yours very truly,

THE NEWTHOT MAGAZINE,

Per.....

Business Manager.

CRE. MBK

5. The court erred in admitting in evidence U. S. Exhibit 28, consisting of eighty-five letters which are too cumbersome to set forth and we therefore request the court to consider this exhibit in its original form.

6. The court erred in admitting the following letter in evidence, U. S. Exhibit No. 30.

Tel. Spring 6700

Home Office

THE NEWOLOGICAL INSTITUTION

The Newology Institute

The Newologist Movement

Dr. J. F. New, Leader

The Newologist Magazine

Official Organ

Headquarters: Broadway Central Hotel

673 Broadway, New York

June 15, 1910.

Mrs. Charlotte A. Scott,
Bloomington, Ill.

Dear Friend:—

We take this opportunity of seeking your co-operation and soliciting your suggestions and interest in the advancement of The Newlife Cause.

Our Leader, Dr. J. F. New, has discovered a vital truth of the greatest moment to Humanity, and you and your friends are cordially invited to join him in his efforts to attain the Newlongevity, Health, Happiness and Beauty of the race.

We shall be glad to hear from you, and if possible have you call and meet Dr. New and talk the subject over as to how we can best conserve the interests of The Newlife Movement.

It is an independent movement for the elevation of men and women to a higher sphere of existence here and now. "Come let us reason together." If you will kindly write or phone as to when it will be convenient for you to call we will arrange for an interview with Dr. New.

Respectfully yours,
Ida B. Stetson, Sec'y.

7. The court erred in admitting the following letter in evidence. This is the letter contained in the fourth count of the indictment. U. S. Exhibit 33.

August 21st, 1915.

Dr. A. B. Stacy-Spear,
1023 S-Grand Ave.,
Los Angeles, Cal.

Dear Friend:

It has been our custom from year to year to confer the honorary degree of DOCTOR OF NEWTHOT upon one or more worthy persons in each state and foreign country who have distinguished themselves in advanced thot for the

propagation of the race and therefore, upon the nomination and recommendation of Dr. N. N. New, by virtue of the power vested in THE NEWTHOT UNIVERSITY, an Educational Corporation for the promotion of the study and practice of THE NEWTHOT SCIENCE, The New Psychology for the redemption of humanity from error, age, poverty, disease and death, and the establishment of The Newlife of health, happiness, prosperity, longevity, immortality, youth, beauty, and peace upon the earth;

We hereby confer upon you the Degree of Doctor of NEWTHOT, D. N., and create you a Newthotist in consonance and in consideration of meritorious work and service in the promulgation of truth and the elevation of humanity to a higher sphere of existence, and authorize you to wear the honor and title D. N. (Doctor of Newthot) in recognition of the distinction and honor bestowed upon you.

The Document admitting you to the Doctorate Degree and creating you a Newthotist is enclosed herewith. This is the highest distinction and honor conferred by this institution, and we believe that in conferring this title upon you, all the world shall say, "It is well."

THE NEWTHOT SCIENCE WORLD CONFERENCE will be held in this City in conjunction with the Panama Pacific International Exposition to which you are invited to take part in the deliberations as well as address the Convention.

With many kind wishes for you and yours, we are always,

Faithfully thine in peace, truth and love,

(Signed) J. F. New, Jr., Vice-President.

N. B. The President sends Newthot Greetings and most cordially INVITES YOU TO SPEAK and also take part in a Symposium at the First Session of the First Day of THE NEWTHOT

SCIENCE CONGRESS to be held in San Francisco, Sept., 6-12. Kindly send in your subject to be entered on program by return mail and oblige,

Secy."

59th. The fifty-ninth assignment of error is based upon the order of the court denying defendant's motion to direct a verdict of acquittal.

All of the foregoing assignment of errors were duly excepted to by the defendant and we will fully set forth the ground upon which the motions were based and the objections made in our discussion hereinafter set forth.

FIRST POINT

The motion to quash should have been granted because the indictment is a direct attempt to prohibit the defendant from the free exercise of his religious beliefs and is also an attack upon the teachings of the religious establishment to which defendant belongs.

The indictment first proceeds to charge defendant with pretending to have attained immortality in the body by a course of righteous conduct, consisting of abstaining from numerous sins. The indictment does not allege that defendant pretended to have any supernatural powers at all, but merely alleges that he pretended to have attained the supernatural state of immortality in the body by a course of righteous conduct. In spite of the fact that the indictment does not allege that defendant pretended to have supernatural powers, it nevertheless proceeds to allege "that such supernatural power had enabled him to conquer disease, death, poverty and misery," and this power could be transmitted to others. It then alleges that defendant pretended that he was of di-

vine origin and birth, a son of the Holy Ghost, greater in authority, majesty and power than was Moses, Elijah and John the Baptist, "Yea, that the mantle of the Man of Galilee" had fallen upon him and that he had received the keys to the kingdom of Heaven; that all of these pretensions are untrue; that defendant is an imposter, an heretic, a seeker of vain-glory, a coveter of his neighbor's wife and his neighbor's goods; that he was an habitual indulger in all the practices he pretended to condemn, to-wit: eating meat, drinking intoxicating liquors, using profane language, telling falsehoods, bearing false witness, and committing adultery.

In the face of these allegations, and especially the allegation that defendant is an heretic, it cannot be successfully contended by the district attorney that the indictment is not an attempt to prevent defendant from the free exercise of his religious beliefs. Even if the charge of heretic was omitted the indictment on its face clearly indicated that it is an attack upon the religious beliefs of the defendant.

The first amendment to the constitution of the United States (Dec. 15, 1791) grants to every citizen the right to profess and embrace whatever religion he shall deem true, and when Congress enacted Section 215 of the Criminal Code it never intended to abridge the constitutional right of religious freedom, nor did it intend that the section should be an instrument whereby a citizen could be deprived of this right, guaranteed by the constitution merely because some people cannot tolerate the religious faiths of others. Toleration is the watchword of the constitution. Our first President said "The government of the United States of America is not in any sense

founded upon the Christian religion," and "Error of opinion may be tolerated where reason is left to combat it." The great majority of people in the United States believe in a Supreme Being or a God, but they have many divers ways and methods of worship, each of which is a scheme whereby they expect or hope to attain either spiritual or physical immortality. It would be useless for us to attempt here to enumerate any of these various methods of worship because the court is not concerned with the particular religious beliefs of various people, nor is the religious beliefs of any man the subject of inquiry by the courts of this country. Nevertheless, this defendant is charged with professing religious beliefs contrary to the established and prevailing religious institutions; if his religious beliefs are such that he feels justified in believing that by a course of righteous conduct he has attained immortality in the body, the right to this belief is guaranteed to him under the constitution and is supported by the Holy Bible. Tr. 183. Surely such a claim could not mislead nor deceive any normal person.

Is it not just as elevating and plausible to claim that by the abstinence from sin you have attained physical immortality as to claim that if you do sin you will suffer the damnation of Hell?

Is it not just as elevating and plausible for a human being to claim that by the abstinence from sin he has attained physical immortality as to claim that he can forgive your sins for a consideration?

Is it not just as plausible to make the claim this defendant is charged to have made, as to claim that a person can be transferred from one sphere to another after death or to claim that there will be a

physical resurrection after death, or to claim that any man is a direct representative of God on earth or many of the other doctrines of various religious societies?

We are all of divine origin and birth, if the Holy Bible is to be believed, born on an equal plane, possessed before God with equal rights, endowed with equal powers to determine righteousness from unrighteousness, and possess the keys to the kingdom of Heaven. These gifts and powers we inherit from him who rules over the destinies of all, yet in this day of our Lord, 1917, a citizen of the United States of America stands charged with claiming that he is of divine origin and birth, a son of God, an impostor, an heretic, a seeker of vain-glory, and almost every thing else of which the human race is heir. Is this our freedom of religion? Are we to have a censor who shall say what religious book may be sold, and what we may buy, what we should believe and what we should not believe? And who is thus to dogmatize religious opinions for our citizens? Millions of innocent men, women and children, since the beginning of Christianity, have been burned, tortured, fined and imprisoned for being heretics, and if this indictment is allowed to stand the test of our courts, it will be the first step on the road leading back to those days of religious intolerance.

If the district attorney attempts to argue that this indictment is not intended to attack the religious beliefs of the defendant, we will call the courts attention to the bill of particulars where he states that "The defendant, JOHN FAIR NEW, is an heretic for the reason that he believes in a doctrine contrary to the established faith of prevailing religions, to-

wit: "The immortality of the body, which is against the Roman Catholic religion, the Episcopal, Presbyterian, Baptist, and other churches." Tr. 78.

The whole indictment is predicated upon these allegations attacking defendant's religion which are prejudicial on their face, and in violation of the constitutional rights of religious freedom. We have diligently searched through all American decisions rendered since the formation of our government, and confess that we have not been able to find any authority, or a single case where a man has been charged with being a heretic, a seeker of vain-glory, a coveter of his neighbor's goods and his neighbor's wife, or pretending that he was of divine origin and birth, or possessed the keys to the kingdom of Heaven, and we venture to say that no such case can be found.

These allegations were evidently inserted in the indictment for the purpose of prejudicing the defendant in the mind of jurors, or those who could not tolerate his religious beliefs. Certainly they had that effect, even if not so intended. Where there is prejudice, it is no use to argue. What are these allegations but an acknowledgment of religious prejudice? The conclusion is irresistible and we therefore claim that the court erred in denying the motion to quash the indictment interposed on the ground herein set forth.

We are not unmindful of the rule that religious belief cannot be accepted as the justification of an act made criminal by the law of the land such as bigamy, adultery, working on Sunday where the law prohibits such working, etc. In such cases it is obvious that a man would not be permitted to excuse his crime by claiming that his religious belief justi-

fied his action. We contend, however, that being an heretic is not a crime and is not a subject of inquiry by a Court of Justice. It is on the contrary a charge most prejudicial in its nature, attacking defendant's religious belief. History discloses instances where innocent people have been murdered because they were heretics and the guilty were not punished but praised rather for their good work in aiding the extermination of heretics. That day, however, has past and we venture to say that the day when a man can be charged in a court of Justice with being an heretic has also past. If not, there is no religious freedom. The district attorney cannot pass this lightly and claim that it is surplusage for it is not surplusage, it is substance; it was read to the jury, it was before the jury, it was made an issue in the case, and it aided in convicting defendant. Certainly it prejudiced the defendant before the jury and would likely prejudice any defendant before a jury especially where, as in our country, religious beliefs in no case disqualify a juror from acting as such. There can be no justification for this charge of heretic. It was inserted in the indictment for a purpose and the only purpose which it could possibly have had was to prejudice the jury against the defendant. Surely it is not possible in this day and age of enlightenment to allege matter in an indictment prejudicial in its nature and then after it has been before the jury, read to the jury and considered by the jury, claim that the defendant was not prejudiced because the charge of being an heretic was surplusage and consequently had no place in the indictment. This would be a mockery of justice. This would permit a man to be charged with one thing and convicted of another, charged with forming a scheme and con-

victed of being an heretic and after conviction we find the prosecuting attorney hiding behind the general verdict and seeking to have it affirmed by claiming it was not intended to convict the defendant of being an heretic even though it was so charged. He will ask the court to say (it is true defendant was charged with being an heretic but he was also charged with forming a scheme and we must assume that he was convicted of forming the scheme) when as a matter of fact he was convicted by the jury of being an heretic and was acquitted on the charge of forming a scheme. This court cannot ascertain upon what charge the defendant was convicted unless it were possible to call the jurors and ask them what they considered in arriving at their verdict. Therefore we claim that where a defendant is charged in an indictment with prejudicial and illegal matter which is absolutely opposed to the spirit and terms of the constitution of the United States, the whole indictment is bad and should be quashed even though it charged other matter, which, standing alone would be perfectly legal.

SECOND POINT.

The court erred in overruling the demurrer to the indictment for the reason that the charges alleged therein consists entirely of general allegations and conclusions of law which were so uncertain ambiguous and unintelligible that it was impossible to prepare a defense thereto.

The particulars of the scheme are matters of substance and must be set out with sufficient certainty to show its intent and character and to fairly acquaint the accused with what he is required to meet and the essential elements of the offense must be set out

with such reasonable particularity of act, intent, time, place and circumstances as will apprise the accused of the charges, to the end that he may prepare his defense and also enable him to plead his conviction or acquittal as a bar to any subsequent prosecution for the same offense.

Brooks v. *U. S.,* 76, C. C. A. 581, 146, Fed. 223.
U. S. v. *Hess,* 124 U. S. 483, 31 L. Ed. 516.
Stokes v. *U. S.,* 157 U. S. 187, 39 L. Ed. 667.
Stewart v. *U. S.,* 55 C. C. A. 641, 119 Fed. 89.
Miller v. *U. S.,* 66 C. C. A. 399, 133 Fed. 337.
Foster v. *U. S.,* 178 Fed. 165.

The indictment does not allege that defendant claimed to have any supernatural powers of any kind or at all. It does allege that he claimed to have attained physical immortality by a course of righteous conduct, but nothing is alleged from which it could even be inferred that defendant claimed to have supernatural powers, yet nevertheless the indictment goes on to allege that "such supernatural powers had enabled him to conquer disease, death, poverty and misery." (Tr. 87). It is apparent that the nature of these powers should have been stated so that we could intelligently prepare our defense. This it did not do, and consequently the defense was prejudiced by the omission.

It is charged that defendant was a "seeker of vain-glory" and it was impossible for us to tell how, or in what manner, it was claimed he sought vain-glory as no facts were alleged upon which this conclusion could be predicated and we could not tell what we would be required to meet until the evidence on this point was actually introduced. This argument applies with equal force to the charge that defendant

was a coveter of his "neighbor's wife and his neighbor's goods". We are entitled to know how, when and where defendant coveted his neighbor's wife and what neighbor's wife. We could not prepare our defense to this charge until we were intelligently informed of the time, place, manner and circumstances of the charges. These matters were evidently within the knowledge of the district attorney when the indictment was returned and should have been stated in order that defendant would know what evidence he would require to combat them. No man should be compelled to go to trial on an indictment that does not inform him of the time, place and circumstances of the acts charged therein. Defendant was also entitled to know what animals he was charged with eating the flesh of, what intoxicating liquors he drank, what profane language he used, what falsehoods he told, against whom did he bear false witness, in what court did he bear false witness. These are all conclusions in the indictment without any support in fact and which the defendant could not possibly prepare to meet without being informed of the manner, time and circumstances of the conclusions alleged. It is charged that defendant committed adultery. This is a mere conclusion of law but if such an allegation is permissible the defendant was entitled to know when and where it was claimed he was married, and who was claimed to be his wife. "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." (Civil Code Cal. Section 93). In order to show defendant's adultery, it was necessary to show that he was married and certainly he was entitled to know when and where it was claimed that he was married and who was claimed to be his wife. It is

charged that defendant is the author of one book, but that that book is only a small compilation of platitudes and garbled extracts from other works. Surely defendant was entitled to know from what other works it was claimed this book was only a small compilation of platitudes and garbled extracts. If it was known that this book was composed of garbled extracts from other works, defendant should have been informed of such works so that he could meet the charge. Evidently these facts were known to the district attorney or he could not have alleged them as conclusions. With allegations of this kind, surprises without number could be sprung during the trial, but if the defendant was fully notified of the facts before the trial, he might be able to show that the other works were only garbled extracts from his book, or, in any event, he could intelligently prepare a defense to the indictment.

Defendant was entitled to know the names of the corporations, companies and associations he was alleged to have organized. Without this information how could any man be prepared for trial on a general charge of this kind? The prosecution could introduce evidence of the remotest nature in a charge so general and defendant would be far at sea until such evidence was actually introduced when it would be too late to prepare to meet it. The same can be said about the allegation that defendant used assumed and fictitious names for the carrying out of the purpose sought to be alleged in the indictment. How could defendant determine in advance of the trial, what assumed and fictitious names the prosecution was going to claim he used? And consequently, how could defendant prepare his defense before he knew what would be urged against him? This seems

so plain that further argument and illustration would appear out of place.

It is alleged that defendant intended to make a false application of Section 602-602A of the Civil Code of California. We could not determine from this allegation, whether they were going to claim when this false application was made, whether one, two, three, or four years before the indictment was returned and therefore it was impossible to prepare a defense on this charge. Under this indictment it would be absolutely impossible for defendant to plead a conviction or acquittal in bar of another indictment for the same offense. A dozen different indictments could be drawn from the matter set forth in these general allegations and conclusions. It would only be necessary to omit the general allegation and conclusion and set forth the actual facts or particulars of the various matters sought to be alleged in these conclusions and when that was done the court would never know, nor could it ascertain whether the facts alleged cover the general allegations set forth in this indictment. The particulars of the scheme being matters of substance and not having been set forth as the law requires it follows that the court erred in overruling the demurrer to the indictment, and it cannot be claimed that the defects in the indictment could have been cured by a demand for a bill of particulars, because defendant demanded a bill of particulars as to all matters heretofore discussed and the demand was denied as will more fully appear in the next point urged.

THIRD POINT.

The court erred in denying defendant's motion for a bill of particulars as set forth in assignment of error number 55, ante p. 14.

The indictment is almost entirely composed of general terms and conclusions which made it impossible for defendant to prepare his defense thereto without being informed of the particulars demanded.

The motion was supported by affidavits. (Tr. 49.) The constitution of the United States requires that the accused should be informed of the charge against him and if the indictment in this case did not intelligently inform the defendant of the acts which he was accused of, then it is fatally defective unless cured by the furnishing of a bill of particulars. In this case a bill of particulars was demanded and the demand was almost wholly denied. The following is a resume of the particulars defendant demanded and the court denied. What is the nature of the supernatural powers by which defendant conquered death, poverty, disease and misery? In what is he an impostor? What vain-glory did he seek? How did he seek vain-glory? How did he covet his neighbor's goods? When did he covet his neighbor's goods? Where did he covet his neighbor's goods? Who is the neighbor whose goods he coveted? What goods of his neighbor did he covet? How did he covet his neighbor's wife? Where did he covet his neighbor's wife? Who is the neighbor's wife he coveted? Who is the wife of such neighbor he coveted? What animals did he eat the flesh of? When did he drink intoxicating liquors? What profane language did he use? What falsehoods did he tell? Against whom did he bear false witness? In what court or tribunal did he bear false witness? Where was the defendant married? When was the defendant married? Who is his wife? From what other books was said one book only a small compilation of platitudes and garbled extracts?

What are the platitudes and garbled extracts which said one book contains? In what cities of the United States did defendant organize companies, associations and corporations? What were the names of said companies, associations and corporations? When were said companies, associations and corporations organized? Where were they organized and under the laws of what states were they organized? To what states did the defendants intend to remove themselves? What concerns and corporations did they intend to organize in other cities of the United States and what were the names of said corporations they intended to organize? What assumed and fictitious names did defendant use? Where did he use assumed and fictitious names? When did he use assumed and fictitious names? Where did defendant intend to advertise the organization and conducting of an educational university? When did defendant make a false application of section 602-602A of the Civil Code of the State of California or when did he so intend to make false applications?

It can readily be seen from the foregoing statement of particulars demanded that the indictment contained, and was almost entirely composed of, allegations in general terms and allegations of conclusions, making it utterly impossible for a man of ordinary intelligence to prepare a defense to it.

The argument presented in support of the demurrer to the indictment applies with more force to the motion for a bill of particulars and practically every point raised by the demurrer is also raised by the motion for a bill of particulars. All of the matters upon which a bill of particulars was demanded were matters of substance, were issues in the case, were considered on the trial and were before the jury.

In support of this point we present all of the authorities cited on our second point. Further argument on this question seems to us unnecessary as it must be apparent from the face of the indictment alone that it would be practically impossible for any defendant to properly prepare a defense thereto without the information demanded by the motion for a bill of particulars.

FOURTH POINT.

The court erred in denying defendant's motion to dismiss the indictment interposed on the ground that he had not been given a speedy trial within the meaning of the sixth amendment to the constitution of the United States which provides that the accused must be given a speedy and public trial.

Defendant was indicted on October 29, 1915, and was taken into custody on November 1, 1915; he entered a plea of not guilty on November 20, 1915, at which time the cause was set down for trial for February 14, 1916. On November 27, the prosecution moved for a continuance of said trial and the same was granted to the 20th day of March, 1916. On said 20th day of March, 1916 the prosecution moved for another continuance of the trial and presented an affidavit in support of the continuance (Tr. 54). Defendant objected to this continuance and to the sufficiency of the affidavit setting forth the ground for a continuance and presented affidavits in support of the objection (Tr. 56-57). The motion for a continuance was granted and the cause continued to April 3, to be re-set for trial. On April 3, upon motion of the prosecution the case was continued to April 10, to be set and on April the 10th on motion of the prosecution and over the objection of defend-

ant, the court continued said cause to July 10, to be set. On April 26, defendant moved the court to dismiss the indictment and in support of said motion presented affidavits setting forth the facts above stated (Tr. 72) together with other facts showing that defendant had not been given a speedy trial and that a further continuance of the matter would deprive him of the right to properly present his defense (Tr. 72).

There was no legal showing made on the part of the prosecution which justified the order of March 20, 1916, continuing the trial of said cause. On the other hand, the affidavits presented by the defense showed clearly that if the trial was continued it would prejudice the defendant to such an extent that he would not be able to properly present his defense. The action of the court in granting this continuance we believe should be taken into consideration in deciding whether the court erred in denying the motion to dismiss. From the time defendant was indicted to the 10th day of July, a space of about eight months, he was ready, willing and anxious to be tried. The court was ready to try the case at any time during said eight months and all delays were granted at the instance and for the convenience of the district attorney.

The constitution guarantees a speedy and public trial to every defendant. Therefore the question to be decided is what constitutes a speedy trial within the meaning of the sixth amendment to the constitution, in other words, can a trial of a cause be delayed for eight months over the objection of the defendant merely to suit the convenience of the district attorney?

The constitution of California, Section 13 of Art. I, guarantees a speedy trial to every person accused of crime and the Legislature has determined what it meant by a speedy trial by enacting section 1382 of the Penal Code which provides that a defendant must be brought to trial within sixty days, so therefore the Legislature, in construing the provision of the constitution providing for a speedy trial, has determined that unless the trial is had within sixty days after the indictment is returned the trial is not speedy within the meaning of the constitution.

People v. *Morina,* 85 Cal. 515. *People* v. *Buckley,* 116 Cal. 151. *Nixon* v. *State,* 41 Amer. Dec. 604 and note thereto. *U. S.* v. *Fox,* 3 Mont. 512. The last cited case was decided by the U. S. court before Montana became a State. The case is directly in point on principle and amply supports our contention that defendant was not accorded a speedy trial in the case at bar.

We think it would be only reasonable to say that four months is ample time to prepare a case of this nature for trial and that this would be only a reasonable construction of the constitutional provision of a speedy trial. This is double the time allowed by statutes in most of the states. (*Nixon* v. *State supra*) these statutes were only enacted for the purpose of carrying out the spirit of the constitution. If this question was presented to Congress, we believe that they would in no event, set more than four months as a standard time within which an accused should be brought to trial. It is not reasonable nor just to keep a defendant under indictment for eight months when he is willing and anxious to go to trial at all times and the court is willing to proceed with

the trial, merely to suit the convenience of the district attorney. This would be giving the district attorney arbitrary power to keep a defendant under indictment at his pleasure.

Judge Cooley, on constitutional limitations, page 382, 4th edition says:

> "Again it is required that the trial be speedy; and here also the injunction is addressed to the sense of justice and sound judgment of the court. In this country, where officers are specially appointed to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused. * * * When a person charged with crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable except that which is only necessary for proper preparation and to secure the attendance of witnesses."

It is therefore apparent that defendant was not given a speedy trial within the meaning of the constitution of the United States, and the court erred in denying his motion to dismiss the indictment.

FIFTH POINT.

The court erred in admitting in evidence over defendant's objection U. S. Exhibits Numbers 22, 23, 24, 27, 29, 30, and 33 as set forth in assignment of errors number 58, ante p. 18.

1. U. S. Exhibit No. 22 purported to be the letter contained in the second count of the indictment (Tr. 13) and the objection by defendant to its admission was that it was not properly identified as a letter coming from defendant (Tr. 159). There was no

evidence to show that defendant wrote this letter or deposited it in the mail, that the signature was that of defendant's, or that he ever saw the letter before. The only evidence offered for the purpose of identifying the letter as coming from defendant or for any other purpose was that the witness received the letter through the mail and forwarded it to the district attorney at his request several months before it was offered in evidence. The witness could only testify that he thought that it was the same letter he received through the mail (Tr. 158).

There should be some evidence identifying the defendant with the mailing of this letter or causing it to be mailed, in the absence of which it was manifest error to admit it in evidence against him. If a letter set forth in an indictment can be admitted in evidence against the accused without in any manner showing his connection with, or causing, it to be mailed then it would be possible to convict him without any evidence at all. The mere fact that a letter is received through the mail purporting to come from the accused, does not show that he mailed or caused it to be mailed. Proof that he signed it or caused it to be signed or caused it to be mailed or that it was mailed with his knowledge or that he was so situated that he should have known it was mailed, is, and should be, essential before it is admitted in evidence against him. No such evidence was introduced in this case.

2. U. S. Exhibit No. 23 as set forth in assignment of errors, ante p. 19, was the letter contained in the third count of the indictment (Tr. 16.). The objection to this letter was the same as the objection to U. S. Exhibit No. 22. (Tr. 159) and the evidence

introduced was the same as that introduced to identify U. S. Exhibit No. 22 above discussed. A further discussion of this exhibit would be repetition of the discussion of U. S. Exhibit No. 22 so we present the same argument and refer the court to that discussion, ante p. 41.

3. U. S. Exhibit No. 24 as set forth in assignment of errors, ante p. 20, purported to be a circular letter sent to the witness by defendant. The objection to this letter was that the letter had not been identified as coming from defendant (Tr. 160). The witness merely stated that he did receive a letter similar to this through the mail; that it came along with the other letters. Inasmuch as the objection and evidence on this point is the same as that discussed in considering U. S. Exhibit No. 22, we refer the court to that discussion and ask the court to consider it as applying to U. S. Exhibit No. 24. Ante p. 41.

4. U. S. Exhibit No. 27 as set forth in assignment of errors, ante p. 21, we will discuss when discussing U. S. Exhibit No. 28.

5. U. S. Exhibit 28 is not set forth in the assignment of errors because it is too cumbersome to print. It contains eighty-five typewritten letters which purport to be copies of letters found in defendant's possession shortly after he was arrested under the indictment in this case. The original exhibit has been forwarded to this court as a part of the record and we pray that the court will consider it in its original state. (It may be well to here state that all of the original exhibits have been transferred to this court as a part of the record). We will now consider Exhibits 27 and 28 together. The same objection was made to each exhibit. The objection to the admis-

sion of these letters was made on the ground that they were incompetent, irrelevant and immaterial and in no way tending to prove any issue in the indictment; that it had not been shown that defendant had ever sent any of the letters through the mail or that they were ever written at his request, or that they were ever used for any purpose, and further to the admission of these letters in a bunch (Tr. 161). The witness testified that he was permitted to go through all of defendant's papers in the booth at the Fair grounds; that he selected these papers from among the papers there at the booth; that defendant did not want to let him have some of the papers (Tr. 161).

The mere fact that these papers were found in a place conducted by the defendant does not show that defendant ever used them in any manner or that they were ever written at his request, nor that he ever used these letters in any manner, shape or form.

Letters written to defendant containing intimation that defendant's business was conducted by dishonest methods which letters defendant never answered are not admissible in evidence. *Marshall* v. *U. S.*, 197 Fed. 511, 117 C. C. A. 65. If letters written to defendant in connection with his business and found in his possession are not admissible in evidence, surely it cannot be said that a large batch of letters such as these could be admitted without showing that defendant had in some way used these letters for the purpose of carrying out his scheme which he is alleged to have formed.

If it be contended that these letters were copies of letters sent to various people then they were incompetent, first, because it was not shown that defendant used the letters for any purpose, second, because the

originals were not accounted for. No rule of evidence is better settled than that if copies of letters were offered the originals must be accounted for. Certainly it should have been shown that defendant sent the originals before the copies were admitted against him, and in any event it should have been shown that these letters or the originals thereof were a part of the scheme and that defendant used them, or authorized their use or knew that they were used in the forming of a scheme. Otherwise, the letters were mere hearsay and inadmissible for any purpose whatsoever.

6. U. S. Exhibit No. 30 as set forth in assignment of errors, ante p. 22, is a letter written by a witness to a party other than the defendants. The witness testified that she wrote this letter in 1910 (Tr. 169). The objection was that the letter was incompetent, irrelevant and immaterial and tending to prove no issue in the case (Tr. 169). This letter was incompetent because it is nothing more than a self-serving declaration. The letter was written to a man named SCOTT and it was not shown that defendant knew anything about the letter or had any connection with the transaction in any manner. A mere statement of this point is sufficient to show manifest error as it can be seen at a glance that the letter was both incompetent and tended to prove no allegation contained in the indictment. It is the rankest kind of hearsay evidence. The mere fact that defendant's name is mentioned by the writer did not connect him with the matter therein stated. We feel that further discussion of this point is unnecessary, as the error contended for is apparent from a statement of the question.

7. U. S. Exhibit No. 33 as set forth in assignment of errors, ante p. 23, is the letter contained in the fourth count of the indictment. The witness testified that she received the letter thru the mail; that it was post-marked San Francisco. She kept the letter until she sent it to the U. S. attorney after which time she did not see it until it was offered in evidence (Tr. 175). The objection to this letter was made on the ground that the proper foundation had not been laid; that the witness could not state whether this is the letter she received from defendant, and that the same has not been identified as a letter received from defendant, and it has not been shown that defendant sent this particular letter or caused it to be sent or knew it was sent, nor that the signature was that of the defendant. In other words, no connection was made in any manner or form connecting the defendant with this letter. All that was shown was merely that the letter was received by the witness through the mail. It is imperative that some evidence connecting defendant with this letter should have been introduced before it was admitted in evidence in the absence of which there is only one conclusion and that is that the court erred in its ruling upon the admission of this letter.

SIXTH POINT.

The court erred in denying defendant's motion to direct a verdict of acquittal as per assignment of error 59, ante p. 25. In the case of *Stokes* v. *U. S.*, 157 U. S. 188, 39 L. Ed. 68, the court said:

> "Three matters of fact must be charged in the indictment and established by the evidence (1) That the persons charged must have devised a scheme or artifice to defraud; (2) that they

must have intended to effect this scheme by opening or intending to open correspondence with some other person through the establishment or by inciting such other person to open communication with them; (3) and that carrying out such scheme such persons have either deposited a letter or packet in the post-office or taken or received one therefrom."

Assuming for the purpose of this argument that the indictment states sufficient facts to constitute a scheme to defraud, was such scheme established by the evidence? There is not one scintilla of evidence in the record to show that defendant ever at any time, or at all, misrepresented a past or present fact or gave a glittering promise for the future. Consequently there was no evidence that he formed a scheme or artifice to defraud.

"Fraud consists of some deceitful practice or willful device calculated to mislead or deceive a person of ordinary intelligence and incite him to do something that he would not have done had he known the true facts." Black's Law Dictionary, p. 517.

Therefore, unless it be shown by the evidence in this case that the defendant misrepresented past, or present facts or future promises which would mislead an ordinary person, his conviction was not justified.

The indictment begins by alleging that defendant was a human being who pretended that he had attained the supernatural state of self-immortality in the body by a course of righteous conduct consisting of abstaining from eating meats, telling falsehoods, bearing false witness, and committing adultery. Ante p. 2. In the first place there is no evidence to show that defendant pretended to have such pow-

ers and in the second place, there is no evidence to show that he pretended to have attained such supernatural state by a course of righteous conduct consisting of abstinence of the sins enumerated. The bill of exceptions contained all of the evidence in this case and we dare say that the prosecution will not be able to point out any evidence sustaining the above proposition or in fact any evidence establishing the scheme as alleged in the indictment.

The indictment then alleges that such supernatural powers had enabled him to conquer disease, death, poverty and misery. Ante p. 2. What supernatural powers had enabled him to do this? It is not even alleged that he had any supernatural powers and we are unable to see how he could transmit these powers to others unless it be alleged in the first instance that he had such powers. Assuming that defendant claimed he had attained immortality by a course of righteous conduct, this would be a fact from which we could not infer that he had supernatural powers that could be transmitted to others, further, there was no evidence that defendant pretended to have supernatural powers and no evidence that he claimed that he could transmit such power to others.

There was no evidence that defendant pretended that he was of divine origin and birth, a son of the Holy Ghost, greater in authority, majesty and power than was Moses, Elijah, and John the Baptist, yea, that the mantle of the "Man of Galilee" had fallen upon him and he had received the keys to the kingdom of heaven. Ante p. 2. While there is no evidence in the record showing that defendant ever made such claims we are at a loss to understand how or by whom the prosecution intended to prove that such

claims were false, had they been proven as alleged. *American School* v. *McAnnulty* 187 U. S. 94. 47 Law ed 90.

It is possibly true that there is evidence to show that defendant was an impostor and an heretic in that he professed and embraced a religion which is contrary to the established faith of prevailing religion, to-wit: the Roman Catholic religion, Episcopal, Presbyterian, Baptist and other churches. Ante p. 28. And this is the under-lying reason for the conviction in this case. Is this a scheme to defraud? If it is, then every man who believes in a religion contrary to that of his neighbor is guilty of forming a scheme to defraud. We fully considered this question in our discussion on the motion to quash (Ante p. 24) and further discussion seems to be unnecessary here. There seems to be no authority in the law decisions bearing upon this point so it was necessary for us to seek elsewhere for some authority to support our contention and we quote from a letter written by Thomas Jefferson to M. Dufief, April 19, 1814. See "Liberty and the Great Libertarians" by Charles T. Sprading, page 82. Also "Life and Works of Thomas Jefferson."

> "I am really mortified to be told that, in the United States of America, a fact like this can become a subject of inquiry, and criminal inquiry too, as an offence against religion; that the question about the sale of a book can be carried before the civil magistrate.
>
> "Is a priest to be our inquisitor, or shall a layman, simple as ourselves, set up his reason as the rule for what we are to read, and what we must believe? It is an insult to our citizens to question whether they are rational beings or not, and blasphemy against religion to suppose

it cannot stand the test of truth and reason. If M. de Becourt's book be false in its facts, disprove them; if false in its reasoning, refute it. But, for God's sake, let us freely hear both sides, if we choose. I have been just reading the new constitution of Spain. One of its fundamental bases is expressed in these words: "The Roman Catholic religion, the only true one, is, and always shall be, that of the Spanish nation. The government protects it by wise and just laws, and prohibits the exercise of any other whatever." Now I wish this presented to those who question what you may sell, or we may buy, with a request to strike out the words, "Roman Catholic," and to insert the denomination of their own religion. This would ascertain the code of dogmas which each wishes should domineer over the opinions of all others, and be taken, like the Spanish religion, under the "protection of wise and just laws." It would show to what they wish to reduce the liberty for which one generation has sacrificed life and happiness. It would present our boasted freedom of religion as a thing of theory only, and not of practice, as what would be a poor exchange for the theoretic thraldom, but practical freedom of Europe. But it is impossible that the laws of Pennsylvania, which set us the first example of the wholesome and happy effects of religious freedom, can permit the inquisitorial functions to be proposed to their courts. Under them you are surely safe."

Following the allegation that defendant is an impostor and heretic, it is alleged that he was a seeker of vain-glory, a coveter of his neighbor's wife and his neighbor's goods and was alleged to habitually indulge in each and every practice he pretended to condemn to-wit: eating the flesh of animals, drinking intoxicating liquors, telling falsehoods, bearing false witness and committing adultery. Ante p. 3.

There is no evidence to show that defendant sought any vain-glory nor any glory at all and no evidence showing that defendant coveted his neighbor's wife and his neighbor's goods, and while it was not shown that defendant claimed to be a total abstainer from eating meat, there was no evidence to show that he was an habitual indulger in it. The testimony was that defendant ate meat in New York in 1910. (Tr. 149) and in San Francisco in 1915 (Tr. 128); that he used the word "damn" (Tr. 137) and "hell" (Tr. 165). Certainly this testimony does not show that defendant was an habitual indulger in all of the sins he was alleged to have pretended to condemn nor does it show that he was an habitual indulger in any of them.

The indictment then alleges that defendant pretended to be the author of 100 books treating of said supernatural powers. Ante p. 3. There is no evidence that he pretended to be the author of any books treating of supernatural powers. There was evidence, however, that he claimed to be the author of 100 books and this is a fact; it was shown that he did make such claim, but there was absolutely no evidence to show that this claim was false.

It is alleged that defendant was the author of one book but such book consisted of a small compilation of platitudes and garbled extracts from other works. Ante p. 3. There is no evidence to show that this book consists of extracts from other works. No other books were offered in evidence for the purpose of showing that this book was not entirely written by defendant.

It is then alleged that defendant organized in various cities of the United States, companies, associa-

tions and corporations with the ostensible object of publishing and selling said 100 books, printing and publishing a magazine, educating and instructing eligible persons and conferring upon them such supernatural powers above described and set forth; that he would claim that said 100 books and said magazine were being published so that the alleged "victims" would invest money in the stock and capital of said corporations which money defendant intended to appropriate to his own use. Ante p. 4. The indictment goes on to negative these allegations and concludes the paragraph by alleging that when the alleged false pretenses became known, defendants, would remove to other cities and make the same claim using assumed and fictitious names for such purpose. Ante p. 4. The evidence shows that defendant organized a corporation in New York in 1910 for the purpose of carrying on his work and that during the years 1913-14-15 he, or those identified with THE NEWTHOT movement, organized THE NEWTHOT PUBLISHERS, THE NEWTHOT UNIVERSITY, THE NEWTHOT CHURCH, and THE NEWTHOT ORDER (U. S. Exhibit 10.). These corporations were organized under and by virtue of the laws where they were formed and the purposes for which they were organized are stated in the articles. U. S. Exhibit 10. These corporations were perfectly legal and complied in every respect with the law of the place where they were organized. Consequently it cannot be contended that they were fraudulent in themselves. There was no misrepresentation of these corporations and there was no evidence to show that defendant claimed that all 100 books and the magazine were being published so therefore the charge that they

made these claims so that the alleged "victims" would invest money in the stock of the corporations and subscriptions of said magazine with the intention of appropriating the money to their own use falls to the ground as no false representations were made by defendant to any person or persons whatsoever. Further, there is no evidence to show that defendant intended to remove to other cities when his alleged fraudulent acts became known as there was no fraudulent acts shown no representation made that would deceive even a child. The same can be said of the allegations that defendant used assumed and fictitious names. Defendant used the names of JOHN FAIR NEW, J. F. NEW, and NEWO NEWI NEW, J. F. NEW being the abbreviation of JOHN FAIR NEW, the name given by his mother and N. N. NEW being the abbreviation of NEWO NEWI NEW, the name given by his father. Of course defendant's name was at one time J. F. NEW, Jr. Defendant also had a cousin by the name of J. F. NEW, Jr. (Tr. 111) who was interested in the NEWTHOT movement. No person was ever deceived by any of these names nor were any misrepresentations made to any person or persons concerning these names. In fact, according to the testimony of all the witnesses, they fully understood the origin of these names. They were not assumed or fictitious but on the other hand, names that the defendant had a legal right to use so long as he did not deceive any person by such use. This is the right that every citizen has, but of course, if a person abuses the use of the name or deceives people into doing things they would not have done had they known the true circumstances, they are responsible to the law for their actions.

There is no evidence to show that defendant misrepresented one single thing concerning his name.

The indictment goes on to allege that defendant would advertise that he had organized according to law and was conducting an educational university for the purpose of treating said art and powers of supernatural healing and teaching. Ante p. 4. It is true that defendant claimed to have organized such university and the evidence shows that he did, but the indictment does not allege that defendant claimed to have any powers of supernatural healing or teaching. Consequently, even if there was evidence that these powers were claimed by defendant such evidence is not predicated on any allegation contained in the indictment. There was no evidence that the university was not what it was represented to be.

It is a fact that defendant claimed that seventy free scholarships had been endowed by a wealthy man and that those possessing these scholarships would pay only ten dollars for enrollment and five dollars for graduation and that the regular price of these scholarships was one hundred dollars. Ante p. 5. There was absolutely no evidence to show that these facts were false nor that defendant ever enrolled more than seventy free scholarships under this endowment, nor was there any evidence to show that no efficacy or power was lodged in said university and no evidence to show that the parties possessing these scholarships did not get exactly what they contracted for. In fact, they were all perfectly satisfied with the course, even the hostile witnesses. They all received exactly what they were told they would receive. They were not misled or deceived as to any past or present fact or future promise.

Finally, it is alleged that defendant made a false application of section 602-602A of the Civil Code of California. Ante p. 5. We did not deem it necessary to set forth the facts wherein it is alleged that the false application of these sections were made for the reason that the sections of the code were not introduced in evidence nor was there any evidence that defendant filed with the county clerk an affidavit as required by said sections of the code. Even if we should concede that such an affidavit was filed by defendant, which we do not, there is no evidence to show that the facts alleged in this paragraph are not absolutely true. There is no evidence to show that defendant had not been regularly elected to the office of Head Bishop nor is there any evidence to show that the church that defendant claimed to be head of had no existence, nor was there any evidence to show that THE NEWTHOT CONGRESS had not been called and held.

U. S. Exhibits Nos. 22, 23, 33 are the letter contained in the second, third and fourth counts of the indictment upon which defendant was convicted. Ante p. 18. The only evidence offered to show defendant's connection with these letters was merely that the witnesses received them through the mail (Tr. 159-176). The court granted the motion to direct a verdict of acquittal as to the first, fifth, sixth and seventh counts of the indictment (Tr. 177) and we urge that the motion should have been granted as to all of the counts for the reason that there was no evidence to show that defendant had anything to do with depositing in the mail the letters contained in counts two, three and four of the indictment. This evidence is indispensable to a conviction under the

ruling of the court in the case of *Stokes* v. *U. S.* 157 U. S. 188, 39 L. Ed. 668.

It can therefore be readily seen that there is no evidence in the record establishing the alleged scheme to defraud, nor that defendant deposited in the mails the letters contained in the indictment. The bill of exceptions contains all of the evidence introduced on the trial (Tr. 241) and we respectfully request the district attorney to point out the evidence which he contends sustains the allegations of the indictment. We are frank to say that we cannot find any such evidence in the record and sincerely believe that none exists. When we consider the utter lack of evidence to support the indictment it is no wonder that the jury included in their verdict a recommendation of defendant to the clemency of the court and found the other defendant not guilty. (Tr. 80)

We therefore submit that substantial justice has not been given defendant and the judgment should be reversed.

Dated May 10th, 1917.

Respectfully submitted,

REISNER & HONEY,

Attorneys for Plaintiff-in-error.

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